

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

United States of America,  
Plaintiff/Respondent,  
vs.  
Ramon Ruiz-Gonzalez,  
Defendant/Movant.

No. CIV 10-2792-PHX-NVW (DKD)  
CR 09-1283-PHX-NVW

**REPORT AND RECOMMENDATION**

TO THE HONORABLE NEIL V. WAKE, UNITED STATES DISTRICT JUDGE:

Ramon Ruiz-Gonzalez filed a timely Motion to Vacate Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255, challenging his conviction following a guilty plea for illegal reentry in violation of 8 U.S.C. § 1326(a), enhanced by § 1326(b)(1), and the imposition of a 46-month prison term, followed by three years of supervised release. Ruiz-Gonzalez raises six grounds in his motion: (1) the district court failed to comply with the federal rules and the constitution during the arraignment, resulting in reversible error in the guilty plea proceedings; (2) his sentence was unreasonable because it was greater than necessary to meet the sentencing goals of 18 U.S.C. § 3553(a); (3) the sentencing court erred and Ruiz-Gonzalez unknowingly and involuntarily waived his right to appeal as part of the plea agreement; (4) his ineligibility for minimum security confinement, drug program, and pre-release custody as a result of his status as a deportable alien were significant mitigating factors that should have been considered by the sentencing court; (5) the sentence imposed

1 was unreasonable; and (6) the district court erred in concluding that Ruiz-Gonzalez's prior  
2 conviction was an aggravated felony. The government contends that Ruiz-Gonzalez  
3 expressly waived his right to file the motion as part of the plea agreement, and that the claims  
4 are without merit. The Court agrees that the right to file a § 2255 motion was expressly  
5 waived, and that the only ground possibly not subject to the waiver is without merit, and  
6 recommends that the motion be denied.

7 Pursuant to the "fast track" plea agreement, Ruiz-Gonzalez admitted that he was  
8 convicted of possession of dangerous drugs for sale, resulting in a sentencing guideline range  
9 of 46-57 months. Ruiz requested that he be sentenced to 46 months, the low end of the  
10 guideline range (Doc. 5, Exh A, RT 1/26/2010 at 7-8). The district court granted his request  
11 (*Id.* at 12). As part of the agreement, Ruiz-Gonzalez waived "any right to file an appeal, any  
12 collateral attack, or any other writ or motion that challenges the conviction, the Court's entry  
13 of judgment against defendant, or the imposition of sentence, including the manner in which  
14 the sentence is determined, including but not limited to any appeals under 18 U.S.C. § 3742  
15 and motions under 28 U.S.C. § 2241 and 2255" (CR 09-1283-NVW, Doc. 21 at 4). He  
16 acknowledged in writing that "this waiver shall result in the dismissal of any appeal or  
17 collateral attack, or other motion the defendant might file challenging the conviction or  
18 sentence in this case" (*Id.*). He also acknowledged this orally to the magistrate judge during  
19 the change of plea proceedings (Doc. 5, Exh B at 15).

20 A defendant may specifically waive the right to file a § 2255 motion. *United States*  
21 *v. Abarca*, 985 F.2d 1012, 1014 (9<sup>th</sup> Cir. 1993). Courts will generally enforce the plain  
22 language of a plea agreement if it is clear and unambiguous on its face, *United States v.*  
23 *Nunez*, 223 F.3d 956, 958 (9<sup>th</sup> Cir. 2000), and the waiver is knowingly and voluntarily made.  
24 *United States v. Joyce*, 357 F.3d 921, 922 (9<sup>th</sup> Cir. 2004). However, "a plea agreement does  
25 not waive the right to bring a § 2255 motion unless it does so expressly." *United States v.*  
26 *Pruitt*, 32 F.3d 431, 433 (9<sup>th</sup> Cir. 1994). In addition, the Government concedes that the Ninth  
27 Circuit has expressed doubt that a defendant, by entering into a plea agreement, could waive  
28 certain claims of ineffective assistance of counsel brought pursuant to a § 2255 motion,

1 notwithstanding an express plea waiver that covered all of a defendant's waivable statutory  
2 rights to file a petition pursuant to § 2255 challenging his conviction or sentence. However,  
3 those claims which are not waivable are limited to ones either challenging the knowing and  
4 voluntary nature of the plea agreement, or the voluntariness of the waiver itself. *See United*  
5 *States v. Jeronimo*, 398 F.3d 1149, 1156-57 n.4 (9<sup>th</sup> Cir. 2005), *citing United States v. Pruitt*,  
6 32 F.3d at 433.

7 None of Ruiz-Gonzalez's claims allege the ineffective assistance of counsel. In his  
8 third ground, however, he asserts that he "unknowingly and involuntarily waived his right  
9 to appeal his sentence as part of the plea agreement." Although he does not implicate  
10 counsel in this assertion, he does assert that the reason he did not raise the issue on appeal  
11 was "based on ineffective assistance of appellate counsel." Assuming this language is  
12 sufficient to raise an unwaivable claim, the claim is nonetheless without merit because the  
13 record reflects a knowing and voluntary waiver by Ruiz-Gonzalez. *See* Doc. 5, Exh B at 15.

14 **IT IS THEREFORE RECOMMENDED** that Ramon Ruiz-Gonzalez's Motion to  
15 Vacate, Set Aside or Correct Sentence be **denied** (Doc. 1).

16 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave  
17 to proceed *in forma pauperis* on appeal be **denied** because denial of the motion is justified  
18 by a plain procedural bar and jurists of reason would not find the ruling debatable.

19 This recommendation is not an order that is immediately appealable to the Ninth  
20 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of  
21 Appellate Procedure, should not be filed until entry of the district court's judgment. The  
22 parties shall have fourteen days from the date of service of a copy of this recommendation  
23 within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1);  
24 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen  
25 days within which to file a response to the objections. Failure timely to file objections to the  
26 Magistrate Judge's Report and Recommendation may result in the acceptance of the Report  
27 and Recommendation by the district court without further review. *See United States v.*  
28 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003). Failure timely to file objections to any

1 factual determinations of the Magistrate Judge will be considered a waiver of a party's right  
2 to appellate review of the findings of fact in an order or judgment entered pursuant to the  
3 Magistrate Judge's recommendation. *See* Rule 72, Federal Rules of Civil Procedure.

4 DATED this 18<sup>th</sup> day of May, 2011.

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David K. Duncan  
United States Magistrate Judge